No. 10,540

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARON ROSENSWEIG and ABE ROSENSWEIG,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANTS.

ARON ROSENSWEIG and
ABE ROSENSWEIG,
Appellants.

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STATEMENT.

The information (R. pp. 3-14) charges the defendants with six violations of Revised Maximum Price Regulations Nos. 169 and 148, as amended, and the Emergency Price Control Act of 1942, as amended. The defendants filed a motion to quash the information (R. pp. 54-56) which was denied (R. p. 56), and a demurrer (R. pp. 11-13) which was overruled (R. p. 56), to which action the defendants excepted and their exceptions were allowed and noted (R. p. 56). Thereupon, on August 2, 1943, defendants pleaded not guilty to all charges in the information (R. pp. 14-15, 56). Thereafter, on August 11, 1943, pursuant to an understanding and arrangement with the United States attorney (R. pp. 61-62, 65-75, 81-88), defendants changed their pleas of not guilty and pleaded

guilty to Counts One and Three of the information (R. pp. 15-16, 56-58); and Counts Two, Four, Five and Six of the information were ordered dismissed (R. pp. 18-20). The understanding and arrangement was that defendants plead guilty to Counts One and Three of the information and be fined $125.00 each on each of said Counts, and that all other Counts of the information be dismissed (R. pp. 61-62, 65-75, 81-88). Thereafter, on August 30, 1943, the Court entered judgment that defendant Aron Rosensweig be fined the sum of $1,000.00 and be committed to jail for thirty days (R. pp. 17-19) and that defendant Abe Rosensweig be fined $1,000.00 on Count One and that imposition of sentence on Count Two be suspended for two years (R. pp. 19-20). On August 31, 1943, defendants filed a motion to vacate said judgments and suspend said sentences, for leave to withdraw pleas of guilty and reenter pleas of not guilty, and for a new trial (R. pp. 64-65) and affidavits in support thereof (R. pp. 65-72) which motion was denied (R. pp. 21-22). Thereafter, on September 3, 1943, each defendant filed Notice of Appeal (R. pp. 24-26, 28-31) and by stipulation (R. pp. 45-46) the appeals were ordered consolidated (R. pp. 46-47).

SPECIFICATION OF ERRORS.

Defendants have assigned errors (R. pp. 115-119) and rely upon each and all thereof. Fundamentally, the errors assigned present three principal questions for consideration:

1. Revised Maximum Price Regulations Nos. 169 (7 Fed. Reg. No. 10381) and 148 (7 Fed. Reg. No. 8609) as amended, promulgated by the Administrator of the Office of Price Administration (OPA), upon which all Counts of the information are based, are unconstitutional and invalid because: (a) said Regulations, at all times mentioned in the information, had not been and were not approved by the Administrator of Food Production and Distribution (commonly known as and called Food Administrator) as required by law, and hence said Regulations were not in effect or binding upon the defendants; and (b) said Regulations are unconstitutional and invalid, in that they deprive defendants of their liberty and property in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

2. The Emergency Price Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator in violation of Article I, section 1 of the Constitution, and in that it sets no standard sufficiently definite to guide the Administrator in the exercise of the delegated powers.

3. The District Court erred and abused its discretion in refusing to vacate the judgments and sentences and permit defendants to withdraw their pleas of guilty and reenter their pleas of not guilty, and in refusing a new trial.

The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended (28 U.S.C.A., Sec. 225(f)) and Rule 3 of the Rules of Criminal Procedure (18 U.S.C.A. Foll. Sec. 688) promulgated by the Supreme Court under authority of 47 Stat. 904, as amended (18 U.S.C.A.

ARGUMENT.

INTRODUCTORY STATEMENT.

The six counts of the information charge defendants with six violations of the Emergency Price Control Act of 1942 (Ch. 26, 56 Stat. 23, 50 U.S.C.A. App. Section 901, et seq.), as amended, and Revised Maximum Price Regulations Nos. 169 (7 Fed. Reg. No. 10381) and 148 (7 Fed. Reg. No. 8609). Counts Two, Four, Five and Six were dismissed by the Court (R. pp. 18-20). Only Counts One and Three are involved in this appeal.

Count One charges defendants with selling one side of grade A beef weighing 296 pounds to one E. E. Surhart for $88.91 in violation of Revised Maximum Price Regulation No. 169 fixing the price thereof at $68.18 and in violation of the Emergency Price Control Act of 1942.

Count Three charges defendants with issuing to one E. S. Surhart an invoice for meats sold to him at the price of $164.71, but that, in fact, defendants charged and received therefor $189.46, in violation of Revised Maximum Price Regulations Nos. 169 and 148, and that the giving of such invoice is in violation of the Emergency Price Control Act of 1942.

Since Counts One and Three charge the offense of violating the legislative order of an executive officer, it is necessary to determine whether such official had lawful authority to make such order, and whether the order is in compliance with all of the requirements of the legislative act purporting to confer such authority. Defendants challenge the validity of Regulations

Nos. 169 and 148 upon the several grounds specified in their assignments of error (R. pp. 115-119), and assert that said Regulations were not in legal effect at the several times mentioned in the information, and that, therefore, defendants were not bound by said Regulations.

I.

REVISED MAXIMUM PRICE REGULATIONS Nos. 169 AND 148, AS AMENDED, ARE UNCONSTITUTIONAL AND INVALID.

It is manifest that the validity of any maximum price regulation promulgated by the Administrator of the Office of Price Administration (commonly known as Price Administrator) must depend upon the provisions of the Emergency Price Control Act, and other Acts of Congress, which, it is claimed, confer upon him authority to issue such regulations. If a citizen is to be punished for a violation of a regulation issued by the Price Administrator, then such regulation must come within the authority conferred by a constitutional statute. If such authority is not conferred, or if the provisions of the statute purporting to confer it have not been followed, then the regulation is invalid.

In *Panama Refining Co. v. Ryan,* 293 U.S. 388, 432, 433, 79 L. Ed. 446, 465, the Supreme Court said:

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order

> is within the authority of the officer, board or commission * * *."

To like effect are: *United States v. Eaton,* 144 U.S. 677, 36 L. Ed. 591; *United States v. 11,150 Pounds of Butter,* 195 Fed. 657 (8 Cir.); *St. Louis etc. Bridge Ry. Co. v. United States,* 188 Fed. 191 (8 Cir.).

In an article entitled, "Validity of Federal Departmental Regulations Involving Criminal Responsibility", 35 Harv. L. Rev. 952, the question under discussion is treated as follows:

> "Assuming that the defendant has violated a departmental regulation, for which the government seeks to hold him criminally responsible, the court must determine whether the regulation is beyond the powers conferred upon the department by Congress. Since the purpose of the exercise by the executive of regulatory functions is to enable Congress more effectively to express its will, the rule-making power cannot be exercised beyond the limits designated by Congress."

A. Regulations Nos. 169 and 148 never became effective.

Section 2 of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23; 50 U.S.C.A. App. Section 902), subject to certain reservations applying to agricultural commodities and products processed therefrom, purports to authorize the Price Administrator to fix maximum prices of various commodities, including meats.

Section 3(c) of the Act (Sec. 903(c) of 50 U.S.C.A. App.) qualifies the authority of the Price Adminis-

trator, as to commodities processed or manufactured from any agricultural commodity, as follows:

> "No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a)."

It cannot be doubted that a side of beef, and other meat products, such as are mentioned and described in the information, are processed from an agricultural commodity, that is, livestock. This is made clear by Section 3 of the Inflation Control Act of 1942 (Section 963 of 50 U.S.C.A. App.) which provides, *inter alia:*

> "That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, *including livestock,* a generally fair and equitable margin shall be allowed for such processing" (italics ours),

the Congress thus making certain that livestock shall be classified as an agricultural commodity.

In this connection, the authority of the Administrator to regulate the prices of agricultural commodities, and of products processed from such commodities, was limited narrowly to such regulations as should be approved by the Secretary of Agriculture. Section 3(e) of the Act (Section 903(e) 50 U.S.C.A. App.) provides:

> "Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity *without the prior approval of the Secretary of Agriculture* * * *." (Italics ours.)

The authority, power and duties of the Secretary of Agriculture, conferred upon him by Section 3(e) of the Act (Sec. 903(e) 50 U.S.C.A. App.), supra, were, by Executive Order No. 9328, dated April 8, 1943, transferred to the Administrator of Food Production and Distribution, commonly called Food Administrator. (See 50 U.S.C.A. App., page 314).

Examination of Regulations Nos. 169 (7 Fed. Reg. No. 10381) and 148 (7 Fed. Reg. No. 8609) shows that the same were never approved by the Secretary of Agriculture, or by the Food Administrator, as required by law, at any of the times mentioned in the information. In the absence of such approval, Regulations Nos. 169 and 148, as amended, never became effective and valid. Hence, an information based thereon, as here, does not charge an offense against the laws of the United States. Therefore, defendants' motion to quash and demurrer should have been sustained.

B. Regulations Nos. 169 and 148 are unconstitutional and invalid.

Regulations 169 and 148, as amended, are also unconstitutional and invalid. These regulations are legislative orders issued by an executive official, and their constitutionality depends (a) upon whether

Congress could and did lawfully delegate its legislative powers to an administrative official, and (b) if constitutionally delegated, whether such official has complied with constitutional requirements in the exercise of such powers.

Defendants assert, first, that Congress did not delegate its powers to the Price Administrator *alone* to regulate prices of meats and meat products, and, second, that the Administrator's Regulations 169 and 148, which were not approved by the Secretary of Agriculture or the Food Administrator, are accordingly unconstitutional and invalid. Defendants further assert that said Regulations are unconstitutional and invalid because they deprive defendants of their liberty and property without due process of law. Further discussion of this proposition follows in Section II hereof.

II.

THE EMERGENCY PRICE CONTROL ACT OF 1942 IS UNCONSTITUTIONAL IN THAT IT ILLEGALLY DELEGATES LEGISLATIVE POWERS TO THE PRICE ADMINISTRATOR IN VIOLATION OF ARTICLE I, SECTION 1, OF THE CONSTITUTION.

It is fundamental that Congress may not delegate purely legislative functions to the executive department of the Government. Many cases so hold. (*Field v. Clark,* 143 U.S. 649, 36 L. Ed. 294; *J. W. Hampton, Jr. v. United States,* 276 U.S. 394, 72 L. Ed. 624; *Panama Refining Co. v. Ryan,* 293 U.S. 388, 79 L. Ed.

that Congress cannot delegate to an administrative officer, board or commission its power to create and define crimes and offenses against the United States. (*United States v. Eaton,* 144 U.S. 677, 36 L. Ed. 591; *Donnelley v. United States,* 276 U.S. 512, 72 L. Ed. 678; *Interstate Commerce Commission v. Brimson,* 155 U.S. 4, 39 L. Ed. 49; *United States v. Maid,* 116 Fed. 650; *United States v. Grimaud,* 220 U.S. 506, 55 L. Ed. 563; *United States v. 11,150 Pounds of Butter,* 195 Fed. 663; *Todd v. United States,* 158 U.S. 282, 39 L. Ed. 982).

This principle is summarized in *Panama Refining Co. v. Ryan,* 293 U.S. 38, 421, 79 L. Ed. 446, 459, as follows:

> "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, Sec. 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, Sec. 8, par. 18. The Congress manifestly is not permitted to abdicate, *or to transfer to others,* the essential legislative functions with which it is thus vested". (Italics ours.)
>
> * * * * * * *
>
> "Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that Section 9(c) of the National Industrial Recovery Act) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, *has*

established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." (Italics ours.)

"* * * the Executive Orders * * * and the Regulations issued by the Secretary of the Interior thereunder, are without constitutional authority."

In *Schechter Corp v. United States,* 295 U. S. 495, 79 L. Ed. 1570, also involving the N.I.R.A., the Supreme Court said, at p. 541 (L. Ed. p. 1586):

"To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. *Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them.* For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, connection and expansion described in section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, *the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the Code-making authority thus conferred is an unconstitutional delegation of legislative power."* (Italics ours.)

The delegation of legislative power condemned in the *Panama* and *Schechter Cases,* supra, was not one whit more offensive to the constitutional provision, supra, than that involved in the case at bar.

Section 1(a) of the Emergency Price Control Act (Sec. 901(a) of 50 U.S.C.A. App.) merely declares the general objects and purposes of the Act. Section 2(a) of the Act (Sec. 902(a) of 50 U.S.C.A. App.) provides:

> "Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following:

Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. * * * Before issuing any regulation or order * * * the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. * * * Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Section 2(c) (Section 902(c) of 50 U.S.C.A. App.) provides:

"Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may

provide for a maximum price or a maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

These provisions of the Act do not prescribe rules for the fixing of maximum prices of meats and like commodities or for the government of any given industry. Instead, the Act merely authorizes the making of codes or regulations by the Price Administrator to prescribe them. For this legislative undertaking the Act sets up no standards aside from the general statement of the general aims of stabilizing prices and preventing abnormal increases thereof. By the foregoing provisions of this Act the necessity or policy of fixing maximum prices of any commodity, including meat, is left solely to the judgment of the Administrator, and whether the prices so fixed are fair and equitable is likewise left to his sole judgment. Even the specified consultations with committees representing industry—obviously advisory only—may "in his judgment" be followed or entirely disregarded. The provisions of the Act that "the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 * * *",—which is closest to fixing a standard for his conduct—is in fact nullified by the qualifying phrases "so far as practicable" and "as in his judgment will be generally fair and equitable", and the later phrase "without regard to the foregoing provisions of this subsection (may), issue temporary regu-

lations or orders". Everything pertaining to the government of industry, the fixing of prices, et cetera, is left to the judgment and discretion of the Administrator, as expressed in codes or regulations promulgated by him. His judgment and discretion are virtually unfettered by any provisions of the Act. This constitutes a delegation of legislative power fully as broad as that which was condemned by the Supreme Court in the *Panama Refining Company* and *Schechter Corp. Cases,* supra, and is equally offensive to and violative of Article I, Section 1 of the Constitution. This delegation also includes the power to create and define crimes and offenses against the United States.

The offenses charged in Counts One and Three of the information are not created or defined by the Act. The offenses charged in these Counts are created and defined by the legislative orders and Regulations of the Administrator. Examination of the Act and Regulations so shows.

The only provisions of the Act which relate to creating or defining a criminal offense are found in Section 4(a) thereof (Section 904(a) of 50 U.S.C.A. App.) as follows:

> "It shall be unlawful * * * for any person to sell or deliver any commodity * * * or otherwise to do or omit to do any act, *in violation of any regulation or order under section 2,* * * *." (Italics ours.)

The "violation" thus made unlawful is not the violation of any provision of the Act itself, but, instead,

is the violation of "any regulation or order (which may be issued by the Administrator) under section 2 of the Act". Thus, in essence, the Administrator is given the power to create and define criminal offenses against the United States. And, the exercise of this power by the Administrator is not safeguarded or hedged about by any standard or rule fixed by the Act, but is left to his unfettered discretion. This is delegation run riot, and, if countenanced, may well result in government by the ukase of an administrative official, instead of government by law as contemplated by the Constitution. Such delegation of legislative power cannot constitutionally be made. (*United States v. Eaton,* 144 U.S. 677, 36 L. Ed. 591; *Donnelly v. United States,* 276 U.S. 512, 72 L. Ed. 678; *Panama Refining Company v. Ryan,* supra; *Schechter Corp. v. United States,* supra, and other cases cited, supra).

III.

THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION IN REFUSING TO VACATE THE JUDGMENTS AND SENTENCES AND PERMIT DEFENDANTS TO WITHDRAW THEIR PLEAS OF GUILTY AND RE-ENTER THEIR PLEAS OF NOT GUILTY, AND IN REFUSING A NEW TRIAL.

After defendants pleaded not guilty to all Counts of the information (R. pp. 14-16, 56) their attorneys entered upon negotiations with attorneys for appellee and the OPA, "looking toward a plea of guilty on some of the Counts of the information and a dismissal of the remaining counts" (R. p. 66). Subsequently, after several conferences at which the matter,

including amount of fines, was discussed, defendants were informed by said attorneys that a fine of $125 on each of two Counts against each defendant would be satisfactory to the Government and OPA (R. pp. 66-68, 74, 75, 78); but the Assistant United States Attorney stated, "he did not feel free to mention figures to the Court", but, "he could talk disposition of the cause and the amount of the fines to the Probation Officer," who, "in turn was privileged to make, and would make, recommendations, including the amount of the fines to the Court" (R. p. 68). Some days later the Assistant United States Attorney informed defendants' attorneys that he had talked with the Probation Officer, who "said he would make such recommendations to the Court with the sole proviso that the records of the defendants should be free from prior convictions" (R. pp. 68, 78). "Upon this assurance they consented * * * to withdraw their pleas of not guilty to Counts 1 and 3 of the information" (R. p. 68). Shortly before the hearing on August 30, 1943, defendants' attorneys were advised by the Assistant United States Attorney that "everything was all right except that the report of the Probation Officer contained the word 'substantial' with reference to the judgment, which they believed was intended only to mean a substantial fine" (R. p. 69). Attorneys for appellee and the OPA substantially admit the facts thus stated (R. pp. 73, 74, 77, 78). Defendants' attorney, John W. Preston, offered to explain this arrangement to the Court at the hearing "but the

Court declined to permit him to make such explanation and said he was not interested in it. * * * Affiant would not have recommended a change of plea had he not been assured that the recommendations described above would be made to the Court by the Probation Officer'' (Aff. John W. Preston, R. p. 69).

Upon this showing the District Court should have permitted defendants to withdraw pleas of guilty and reenter their pleas of not guilty, and refusal to do so constituted error and abuse of discretion under the authorities.

Rule 2(4) "Criminal Procedure after plea of guilty, verdict of finding of guilt'' (18 U.S.C.A. App. following Sec. 688) provides:

> "A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.''

Rule 2(2), id., provides:

> "* * * motions in arrest of judgment, or for a new trial, shall be made within three days after verdict or finding of guilt.''

Defendants' motions were made within the times fixed by Rule 2(4) and 2(2), supra, but after sentence. Inasmuch as sentence was summarily imposed in announced disregard of an existing agreement, we assert that no opportunity was afforded, prior to sentence, to withdraw plea, and hence defendants' motion should have been granted. This contention is supported by both reason and authority.

In *Robinson v. Johnston,* 118 F. (2d) 998 (9 Cir.), this Court held that "a motion to vacate judgment and to withdraw plea of guilty on grounds that defendant was insane, under duress and misrepresentation when he pleaded guilty * * * and that Court erred in imposing sentence less than ten days after the plea, went to the jurisdiction of the trial court" (Syl. 2), and said, page 1000:

> "We hold that where the motion to the trial court is based upon facts that properly would have been brought to the court's attention at common law by the writ of error coram nobis, such motion may be made after the expiration of the time fixed for such motions by Rule II, supra."

The motion here in question is analogous to the motion made in the *Robinson Case,* supra, and should have been granted. See, also, *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461; *Frame v. Hudspeth,* 309 U.S. 662, 84 L. Ed. 898; *Deutsch v. Aderhold,* 30 F. (2d) 677; *People v. Schwarz,* 201 Cal. 309; *Clemons v. United States,* 137 F. (2d) 302 (Adv. Op.); *Paris v. United States,* 137 F. (2d) 302 (Adv. Op.).

In *Clemons v. United States,* 137 F. (2d) 302 (4 Cir.) supra, the Court held that "where assistant United States district attorney gave defendant his assurance that he would be prosecuted under misdemeanor provisions of criminal statute, and thereafter sentence was imposed * * * under felony provisions of the statute, defendant was deprived of liberty in violation of 'due process of law' Clause of Federal Constitution" (Syl. 5). Defendant had pleaded not

guilty to the entire indictment. In this connection the Court said, pages 305, 306:

> "We cannot clearly and surely assume what course of conduct would have been adopted by Clemons and his counsel had they not relied on the statement of the Assistant District Attorney. Perhaps, without this assurance and with a possible felony charge and punishment therefor before him, Clemons might have been willing to plead guilty to a misdemeanor charge, and this might have been accepted by the court. Perhaps, without this assurance, Clemons and his counsel might have used much greater diligence in preparation for trial and might have employed equally different tactics during the course of the trial itself. We cannot be sure just what would have been the course of events.
>
> It may well be that Clemons and his counsel acted a bit precipitately in accepting this assurance at its face value and in proceeding accordingly. It does not follow that they, therefore, acted altogether unreasonably. Certainly the whole procedure smacks of surprise, which should if possible be avoided.
>
> A criminal trial is not, of course, to be likened to a game. It is an inquiry into truth in order that justice may be done. A trial, however, must be fair; and one of the requisites of a fair trial is that the accused be fairly advised of the nature of the offense for which he is being tried. He may not be tried for one offense and be convicted of another; but this is in substance what happens when he is assured by the prosecuting attorney and understands that he is being prosecuted for a misdemeanor under an indictment, which is inter-

preted for the first time after conviction to charge a felony.

We think, accordingly, that Clemons, under the circumstances of this case, was deprived of his liberty against the spirit, if not the letter, of the Due Process Clause of the Constitution of the United States. We think he has been dealt with unfairly in the light of our standards of justice towards those accused of federal crimes—standards, in our opinion, which the courts must always adequately safeguard and must, under all circumstances, zealously protect."

There is no question but that defendants in the case at bar relied upon the statements and arrangement made, as hereinbefore set forth (R. pp. 61-62, 65-75, 81-88). They had sufficient cause for such reliance.

People v. Schwarz, 201 Cal. 309, is in point. It was there said, p. 314:

"Too much may not be done to purify and keep pure the administration of justice. If a defendant could not rely upon a covenant made with her by the head of the committee of the grand jury and the office of the district attorney, then indeed would our whole system of legal procedure be brought under the cloud of suspicion. It is far better that one woman go unpunished than that it be said that the officers of the law in charge of the prosecution of crimes may play fast and loose with their promises to defendants under indictment. Precedent for procedure for relief under these circumstances, where the facts warrant it, is found in the following cases: *People v. Perez,* 9 Cal. App. 265 (98 Pac. 870); *People*

v. Mooney, 178 Cal. 525, 529 (174 Pac. 325); *People v. Reid,* 195 Cal. 249 (36 A.L.R. 1435, 232 Pac. 457.)"

In *Paris v. United States,* 137 F. (2d) 300 (4 Cir.), the defendant's bail was ordered forfeited for failure to appear for trial. The defendant urged that "he was led to believe that he would receive further notice, before being required to appear before the Court", to be given him by the United States attorney; that he relied upon the statement of said Attorney; that he received no notice, and hence did not appear (id. p. 301). Upon these contentions the Court said (p. 302):

> "In stating that it was unnecessary for him to pass upon what statements were made by the District Attorney, we are of the opinion that the Judge below was in error as a matter of law. The District Attorney is the duly accredited prosecuting officer of the government with certain well defined duties with respect to the cases under his control. The defendant Paris and his friends would naturally be influenced by any statement or promise made by the District Attorney. That there was some arrangement, a perfectly proper one, under which the District Attorney was to give Paris some notice before it would be necessary for him to come to court is shown by the fact that the District Attorney did try to get word to Paris.
>
> It is true that promises and representations made by a District Attorney to the defendant are not binding upon the District Judge, who presides at the trial of the case. Yet, in the instant

> case, the alleged representations of the District Attorney have real evidential value in tending to show that here the default of the defendant was not willful."

It is manifest that there was an understanding between defendants and the United States Attorney and attorneys for the OPA, but for which defendants would not have changed their pleas of not guilty. It is obvious that defendants relied and acted upon this understanding, which, in all essential respects and for all necessary purposes was an agreement between the parties. It is true, of course, that the trial Court was not bound by the agreement; but, when he repudiated the agreement he should have permitted defendants to withdraw pleas of guilty made pursuant to the agreement and reenter their pleas of not guilty. Defendants were surprised at the refusal of the trial Court to respect the agreement of the parties, and at the immediate judgment and sentence. A procedure, such as this, which "smacks of surprise, * * * should if possible be avoided" (*Clemons v. United States,* supra). And, it could have been avoided by granting defendants' motion, made within twenty-four (24) hours thereafter, to vacate judgments and permit them to withdraw pleas of guilty induced by the agreement mentioned. Refusal of the trial Court to grant this timely motion was, we respectfully submit, error and abuse of discretion.

CONCLUSION.

For the reasons set forth herein it is respectfully submitted, (a) that the lower Court erred in rendering judgment, and (b) in refusing to vacate said judgment and grant a new trial.

Wherefore appellants pray that the judgments of the District Court be reversed and that a new trial be granted.

Dated, Los Angeles, California,
January 3, 1944.

Respectfully submitted,
ARON ROSENSWEIG and
ABE ROSENSWEIG,
Appellants.
JOHN W. PRESTON, and
SAMUEL MIRMAN,
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